STATE OF MICHIGAN

COURT OF APPEALS

ALLEN BARBARICH,

Plaintiff-Appellee,

v

CIVIC PROPERTY & CASUALTY COMPANY,

Defendant-Appellant.

UNPUBLISHED
August 1, 2006

No. 264986
Wayne Circuit Court
LC No. 05-509552-CZ

Before: Kelly, P.J., and Markey and Meter, JJ.

KELLY, P.J. *(dissenting).*

I respectfully dissent from the majority's conclusion that defendant's letter of September 14, 2004 was the date of denial that would recommence the one-year statutory period of limitations. Rather, in my opinion, defendant's March 15, 2004 letter that enclosed "final payment" and "conclue[d]" the claim is the effective date of denial. I would reverse.

Statutes of limitation are designed to encourage the rapid recovery of damages, to penalize plaintiffs who have not been assiduous in pursuing their claims, to afford security against stale demands when the circumstances would be unfavorable to a just examination and decision, to relieve defendants of the prolonged threat of litigation, to prevent plaintiffs from asserting fraudulent claims, and to remedy the general inconvenience resulting from delay in asserting a legal right that is practicable to assert. *Sills v Oakland General Hosp,* 220 Mich App 303, 312; 559 NW2d 348 (1996), citing *Lemmerman v Fealk,* 449 Mich 56, 65; 534 NW2d 695 (1995).

Plaintiff does not dispute the fact that the insurance policy provides that any action under the policy must be filed within one year of the date of loss. This contractual provision is consistent with MCL 500.2833(1)(q), which provides that a fire insurance policy must contain a provision that an action under the policy must be brought within one year after the loss, unless a longer period is specified within the policy. The statute does provide for tolling from the time the insured notified the insurer of the loss until the insurer denies liability. The question presented here is when defendant formally denied liability and thereby triggered the resumption of the statute of limitations.

For the purpose of defendant's motion for summary disposition, the facts were largely undisputed. The date of loss was February 24, 2002, and Warren Sanford provided notice of the

loss on April 1, 2002. The claim was originally denied on August 9, 2002. Plaintiff separately provided notice of the loss on January 7, 2003. Defendant made a partial payment on the claim in October 2003. Negotiations continued. On March 15, 2004, defendant sent plaintiff's attorney a letter enclosing "final payment" of $95,003.11. In the letter, defendant thanked plaintiff's attorney for his assistance "in concluding this claim" and noted the difference between plaintiff's claimed losses and the "net payment to conclude claim." Defendant also directed attention to the policy provision that prohibited suit against defendant "unless the policy provisions have been complied with and the action is started within one year after the date of loss." This March 15, 2004, letter clearly settled the claim and meant that no further benefits would be paid. As such, it triggered the resumption of the limitations period.

Plaintiff contends, and the majority accepts, that the March 15, 2004 letter was not a denial of benefits, but rather, was merely a payment of benefits. In my opinion, this argument is creative but without merit. The amount of benefits to be paid were always in dispute and, in issuing the letter, defendant clearly denied any liability beyond $95,003.11, which was the "net payment to conclude claim." "Net" means "remaining after all necessary deductions have been made or all losses accounted for . . " and "ultimate; final." *The American Heritage Dictionary of the English Language*, (3rd ed, 1992). "Conclude" means "to bring to an end; close; finish." *Id.* I do not believe it can be seriously disputed that defendant, in issuing the letter and stating that the enclosed payment constituted the "net payment to conclude claim," meant that it was the last payment it was going to make and that it was closing the claim. That letter reflects a formal denial of any further liability and stopped any tolling of the period of limitations. Therefore, *at most*, plaintiff had one year from the time of that letter to commence his action. The action was not filed until approximately 13 months later. Plaintiff's claim under the policy was untimely.

Moreover, adoption of the majority's position will leave a determination of the onset of a limitation period an open question within the subjective control of the plaintiff. A limitations period would never begin to run anytime a settlement has been made and a file closed. Potentially a plaintiff could wait one, two, five, ten or even twenty years and simply ask for additional benefits to start the statute running again. Placing a plaintiff in this discretionary position would vitiate the statute of limitations as a defense, would burden defendants with the prolonged threat of litigation, and is a circumstance which should be rejected.

The trial court erred in denying defendant's motion for summary disposition. I would reverse.

/s/ Kirsten Frank Kelly